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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 243

IN THE MATTER OF THE ESTATE OF GEORGE W. ROBERTS, DECEASED

LORETTO LOHMAN ROBERTS,

Petitioner,

vs.

FRANKLIN H. ROBERTS and HELEN ROBERTS TRUAX,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

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Great Falls, Montana,
Of Counsel

Filed ....., 1959

..... Clerk

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

To The Honorable Chief Justice and to
The Associate Justices of the Supreme Court
of the United States:

Petitioner, Loretto Lohman Roberts, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Montana entered in the above cause on the 29th day of April, 1959. The Supreme Court of Montana reversed the judgment entered by the District Court of the Twelfth Judicial District of the State of Montana, in and for

the County of Blaine, and decided that the respondents herein were each entitled to certain legacies under a will and that petitioner herein was entitled to the residue of her deceased husband's estate.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Decree of the District Court in and for Blaine County, Montana, appear as Appendix A hereto. The first opinion of the Supreme Court appears as Appendix B hereto, and it does not appear that the said opinion was ever reported. The opinion on which a writ of certiorari is sought appears as Appendix C hereto. Such opinion has not been officially reported but appears in 338 P. (2d) 719.

JURISDICTION

On March 21, 1958, the Supreme Court of Montana entered an opinion reversing the decree of the District Court (Appx. B). This opinion does not appear to have been reported. Petition for rehearing was timely filed and on April 29, 1959, the Supreme Court withdrew the first opinion and substituted a new opinion which was filed the same day (Appx C). Also on April 29, 1959, remittitur to the District Court was issued, reversing the decree of the District Court. This remittitur was filed in the District Court on May 1, 1959. Since no time was allowed by the Supreme Court for rehearing, a motion to recall the remittitur and to grant a rehearing was filed after the issuance of the remittitur, which motion was denied

by the Supreme Court on July 20, 1959 (Appx. D). Jurisdiction of this Court is invoked under 28 U.S. C.A., Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether, under the facts here presented and the law applicable thereto, property of the Petitioner has been taken from her without due process of law contrary to the provisions of the Constitution of the United States, Amendment 14.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 22-107, Revised Codes of Montana, 1947, provided prior to 1955:

> "Every devise or bequest shall bar a widow's dower in lands or her share in personal estate unless otherwise expressed in the will; but she may elect whether she will take such devise or bequest, or whether she will renounce the benefit of such devise or bequest, and take her dower in the lands and her share in the personal estate."

Section 22-107, Revised Codes of Montana, 1955 Replacement, provides:

> "Every devise or bequest to her by her husband's will shall bar a widow's dower in his lands and her share in his personal estate unless otherwise expressed in the will; but she may elect whether she will take under the provisions for her in the will of her deceased husband or will renounce the benefit of such provisions for her, and take her dower in the lands and her share in the personal estate under the succession statutes, as if there had been no will, but not in excess of two-thirds (2/3) of the husband's net estate, real and personal, after the payment of creditors' claims, expenses of ad-

ministration and any and all taxes, including state and federal inheritance and estate taxes."

Section 22-108, Revised Codes of Montana, 1947, provides:

"When a woman is entitled to an election under this chapter, she shall be deemed to have taken such devise, unless, within one year after the authentication or probable of the will, she shall deliver or transmit to the district court of the proper county a written renunciation, which may be in the following form, to-wit: I, A.B., widow of C.D., late of the county of ....., State of Montana, do hereby renounce and quit all claims to the benefit of any bequest or devise made to me by the last will and testament of my said deceased husband, which has been exhibited and proved according to law (or otherwise, as the case may be), and I do elect to take in lieu thereof my dower, or legal share of the estate of my said husband,' which said letter of renunciation shall be filed in the office of the clerk of the district court, and shall operate as a complete bar against any claim which such widow may afterwards set up to any provision which may have been thus made for her in the will of any testator, in lieu of dower; and by thus renouncing all claims as aforesaid, should widow shall thereupon be entitled to dower or share in the personal estate of her husband."

Section 91-403, Revised Codes of Montana, 1947, provides in part:

"When any person having title to any estate not limited by marriage contract dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided by the laws of Montana, subject to the payment of his debts, in the following manner:

* * * *

"2. If the decedent leaves no issue, the whole of

the estate shall go to the surviving husband or wife. . . ."

STATEMENT

Petitioner, under the applicable laws of the State of Montana, at the death of her husband acquired a vested interest in the personal estate of which she was deprived by the refusal of the Supreme Court of Montana to interpret the above statutes and to determine the meaning of the expression therein "her share in the personal estate."

I.

Manner of Raising the Issue in the Courts Below

The question herein raised is that of the outright refusal of the Supreme Court of the State of Montana to construe a statute of the state. The issue was not present in the District Court, where the statutes were construed (Conclusions of Law, Appx. A), and arose when the opinion of the Surpreme Court established that the Supreme Court declined to construe, apply, or interpret the statute in any way. The issue was thereafter raised by Motion for Rehearing, which motion was denied by the Supreme Court on July 20, 1959 (Appx. D). The Motion for Recall of Remmittitur and for Leave to File Petition for Rehearing is found in the Transcript of the Proceedings before the Supreme Court. On page 3 of the said Motion it is stated:

> "This failure to construe, interpret and apply the provisions of Section 22-107, Revised Codes of Montana, 1947, insofar as it provides that upon renunciation a widow shall 'take her share in the per-

sonal estate,' results in the taking of a widow's property without due process of law as provided in the Fifth Amendment of the Constitution of the United States, and is contrary to the provisions of the Fourteenth Amendment . . . ."

The denial of due process arising only as a result of this opinion of the Supreme Court of Montana, the constitutional question was timely raised by the Motion.

Brinkerhoff-Faris Trust & Savings Co. v Hill, 281 U.S. 673, 74 L. Ed. 1107 (1930)

Great Northern R. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 77 L.Ed. 360 (1932).

II.

Discussion and Argument

George W. Roberts died testate in Montana on November 9, 1954, being survived by his wife, Loretto Lohman Roberts, the Petitioner herein, and his brother and sister, Franklin H. Roberts and Helen Roberts Truax, the Respondents. Under the provisions of his will, each of the Respondents received a legacy of $20,000.00, and Petitioner received the residue of the estate, which estate consisted entirely of personal property. Mrs. Roberts filed a timely renunciation of the will, electing to take her share of the personal estate of her deceased husband. The trial court determined that by virtue of Section 22-107, Revised Codes of Montana, 1947, as it read at the time of testator's death, and Section 91-403, Revised Codes of Montana, 1947, the widow was entitled to the entire estate (Appx. A). Timely appeal

from the decree was taken by the brother and sister, and the Supreme Court of Montana rendered an opinion on March 21, 1958, reversing the trial court. A timely Petition for Rehearing was filed by Petitioner herein on the grounds, **inter alia,** that:

> "1. The opinion of Judge Victor H. Fall either overlooks or absolutely ignores the principal question here presented to the Supreme Court.
>
> "2. In his opinion Judge Fall refuses to define the share in the personal property of her deceased husband which a widow shall have under her absolute right of renunciation of the will."
>
> (Proceedings before the Supreme Court, Tr., Respondent's Petition for Rehearing, pp. 1-2)

Over a year later, the Supreme Court withdrew the first opinion and rendered a new opinion on April 29, 1959 (Appx.C). This opinion, too, refused to determine what interest in the personal estate the widow is entitled to upon renouncing the will. Remittitur was issued the same day and was filed on May 1, 1959, allowing Petitioner no opportunity prior to that time to raise the constitutional question. As was pointed out, this question was raised by motion thereafter, which motion has been denied.

The opinion orders that the brother and sister are to be adjudged to be entitled to their legacies, and that Mrs. Roberts is to receive the residue of the estate—which results in the peculiar proposition that a widow upon renouncing a will receives, as a result of her renunciation exactly what she was given under the will.

But Petitioner's question herein does not go to an erroneous interpretation of the statutes on renunciation and a widow's share. Rather, it goes to the complete refusal of the Supreme Court to interpret and apply these statutes. For all practical purposes, Petitioner is treated by the Supreme Court of Montana as having never renounced the will; the Court has declined to determine the effect of such renunciation.

Section 22-108, Revised Codes of Montana, 1947, clearly evidences that the widow, upon filing her renunciation is then entitled to her share in the personal estate. Thus, her share of the estate became vested in Mrs. Roberts at the time of her election in May of 1955 and related back to the time of the testator's death.

97 C.J.S., Wills (1957) § 1288, pp. 133-135 (and cases cited).

It is clear that the federal constitutional guarantee of due process extends to action by the state judiciary as well as to the state legislatures and executives.

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 74 L.Ed. 1107 (1930).

Shelley v. **Kraemer,** 334 U.S. 1, 92 **L.Ed.** 1161 (1948).

Thus, in spite of the fact that the Petitioner had a vested interest in the personal estate in accordance with the statute, and in spite of the fact that the question of the meaning of the term "share in the personal estate" was raised in the trial court and on

appeal, the Supreme Court of Montana has ignored Petitioner's interests and has determined what her rights are without reference to the statute which determined those rights. In effect, the Court has refused to heard her on the question of her rights under the statute, a denial of due process under **Brinkerhoff** case, **supra.**

It is, of course, **the duty** of a court to interpret and apply the statutes of the state in cases properly before the court.

Massachusetts v. **Mellon,** 262 U.S. 447, 67 L.Ed. 1078, 1085 (1923).

State ex rel Dufresne v. Leslie, 100 Mont. 449, 455, 50 P. (2d) 959 (1935).

". . . And of course we shall not assume that the Virginia courts will not do their **full duty** in judging these statutes in the light of state and federal constitutional requirements." (Emphasis added)

Harrison v. **N.A.A.C.P.**, 3 L.Ed. 1152, 1159 (1959).

"In the construction of a statute the primary duty of the court is to give effect to the intention of the legislature in enacting it . . . and very word, clause, phrase, and sentence must be given effect, if possible."

In re Wilson's Estate, 102 Mont. 178, 193, 56 P. (2d) 733 (1936).

"The **written law** of this state must prevail as against the declaration or promulgation by this court of an opposing rule at variance with and contrary to such **written law.**" (Emphasis by the court)

State v. School District, 129 Mont. 243, 254, 284 P. (2d) 998 (1955).

There is not just an erroneous interpretation of a statute to be complained of here, but a refusal to to interpret it at all. We quote the words of the decision:

> "We need not here determine what interest in the personal estate the widow is entitled to upon renouncing the will."

And yet, under the cases cited above it was and is the duty of the Court to determine such interest by an interpretation of Section 22-107, Revised Codes of Montana, 1947. When the Court refused to make such interpretation after the question had been properly raised, there was a failure of due process.

> ". . . If the legislature did not intend that the courts should accept and act upon this statute as it is written, then the legislature, and not the courts, should amend the Act and make it clearly express the legislative will . . . 'Our duty is not to enact, but to expound, the law, not to legislate, but to construe legislation; to apply the law as we find it, to maintain its integrity as it has been written by a co-ordinate branch of the state government'." (and cases cited)
> **Clark** v. **Olson,** 96 Mont. 417, 432, 31 P (2d) 283 (1934).

In the present case the widow renounced the testator's will, stating she wanted her share of his estate as allowed by law. The Supreme Court of Montana announced, "To heck with the law, you'll take what we give you." The failure to construe the statute which was the entire basis of the decision of the trial court is certainly "a change brought about

through something done or omitted by the Supreme Court of Montana in deciding the appeal."

Great Northern R. Co. v. **Sunburst Oil & Ref. Co.**, 287 U.S. 358, 77 L.Ed. 360, 366 (1932).

CONCLUSION

As a result of the failure of the Supreme Court of Montana to interpret the statute giving a widow renouncing her husband's will her share of the personal property left by her husband, Petitioner has been deprived of property vested in her by the act of the Montana legislature. The legislature gives, the Court taketh away, which may be poetic, but is a violation of the Court's duty and a denial of due process of law.

Respectfully submitted,
Attorney for Petitioner.
H. CLEVELAND HALL.

JOHN C. HALL,
Of Counsel

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF MONTANA

IN THE MATTER OF THE ESTATE OF GEORGE W. ROBERTS, DECEASED

LORETTO LOHMAN ROBERTS,

Respondent.

Vs.

FRANKLIN H. ROBERTS and HELEN ROBERTS TRUAX,

Appellants

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE

The matter of the determination of heirship in the above entitled estate was submitted to the Court pursuant to order duly made, given and entered in the above proceeding on the 1st day of October, 1955, upon the files, records and papers in the above estate, the pleadings filed in said heirship proceeding, and upon brief submitted to the Court by counsel for the respective parties, to-wit: Loretto Lohman Roberts, plaintiff, and Franklin H. Roberts and Helen Roberts Truax, defendants. The Court having considered the briefs of counsel for the parties, and being in all things duly advised in the premises, makes the following:

FINDINGS OF FACT:

I.

George Roberts died testate at Havre, Hill County, Montana, on the 9th day of November, 1954, leaving surviving him, as his sole heir at law, his widow, Loretto Lohman Roberts, the plaintiff herein.

II.

That thereafter and on the 4th day of December, 1954, such proceedings were had in the matter of the estate of the said George W. Roberts, deceased, that by order of this Court, duly made, given and entered, the Last Will and Testament of the said George W. Roberts was admitted to probate and on said date letters testamentary were duly issued to the said Loretto Lohman Roberts and Oswald M. Johnson.

III.

The estate of said George W. Roberts, as shown by the inventory and appraisement filed herein, consists entirely of personal property.

IV.

By the Will of said decedent, George W. Roberts, there was bequeathed to Helen Roberts Truax, sister of decedent, the sum of Twenty Thousand Dollars ($20,000.00), and to Franklin H. Roberts, brother of decedent, the sum of Twenty Thousand Dollars ($20,000), and the rest and residue of his estate was devised and bequeathed to his widow, Loretto Lohman Roberts.

V.

On May 27th, 1955, Loretto Lohman Roberts, plaintiff herein, transmitted to and filed with the Clerk of this Court, her written renunciation of the will of said George W. Roberts, deceased, in the form provided and required by the provisions of Section 22-108 of the Revised Codes of Montana, 1947.

VI.

Thereafter and on the 14th day of June, 1955, the said Loretto Lohman Roberts filed herein her petition for determination of heirship as provided and required by Section 91-380 of the Revised Codes of Montana, 1947, requesting that an order be made by the Court directing service of notice to and upon all persons interested in the estate of George W. Roberts, and that this Court ascertain and declare the rights of all persons to said estate, and all interests therein, and to whom distribution thereof should be made.

VII.

Pursuant to said petition an order was duly made, given and entered for the issuance of said notice out of this Court, and upon the filing of such order and on the 14th day of June, 1955, notice was issued under the seal of this Court directed specifically to Loretto Lohman Roberts, Helen Roberts Truax and Franklin H. Roberts, each of whom thereafter filed their written appearance in said heirship proceeding, together with written authorization for counsel to act for and represent them in said heirship proceeding.

VIII.

On September 2nd, 1955, this Court made its order establishing due and legal service of said notice upon said Loretto Lohman Roberts, Helen Roberts Truax and Franklin H. Roberts, and thereafter and on the 7th day of September, 1955, the said Loretto Lohman Roberts duly filed her verified complaint in said heirship proceedings as provided and required by Section 91-3802 of the Revised Codes of Montana, 1947.

IX.

Thereafter such proceedings were had in said heirship proceedings that said matter was submitted to the Court for decision as aforesaid.

WHEREFORE, by reason of said Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW:

I.

That the plaintiff, Loretto Lohman Roberts, having on the 27th day of May 1955, filed with the Clerk of this Court, wherein the will of the deceased George W. Roberts was in course of probate, her renunciation in due and legal form of the Last Will and Testament of said deceased, she is entitled to take, inherit and receive her legal share of the personal estate of said deceased, to-wit, the whole thereof, as provided by Sections 22-107 and 91-403.

II.

That the plaintiff, Loretto Lohman Roberts, is not

estopped to renounce the will of said decedent, George W. Roberts.

WHEREFORE, by reason of said Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. That the plaintiff, Loretto Lohman Roberts, is the sole heir at law of the decedent, George W. Roberts, and as such is the owner of the entire estate of said decedent and is entitled to have the whole of said estate distributed to her by decree of distribution of this Court.

DATED this 14th day of December, 1955.

C. B. ELWELL
Judge of the District Court.

FILED: December 19, 1955.

APPENDIX B

Honorable Victor H. Fall, District Judge, sitting in place of Mr. Justice Bottomly delivered the Opinion of the Court.

The facts involved in this appeal are:

George W. Roberts died testate on November 9, 1954. He left surviving his widow, Loretto Lohman Roberts. There were no children. The will was offered for and admitted to probate. No question whatever has been raised relative to the validity of the will. Letters testamentary were granted to the surviving widow, respondent herein, and her coexecutor on December 4, 1954. The inventory and appraisement filed April 19, 1955, disclosed that the estate consisted

wholly of personal property—cash in the sum of $49,296.60, stocks, bonds, notes and mortgages in the sum of $256,576.67, and a 1949-model automobile of the value of $500, or a total of $306,372.67. On June 18, 1955, a supplemental inventory and appraisement listed, "for tax purposes only," real property situate in Cascade County, Montana, of the value of $25,000. Total creditors' claims filed amounted to less than $1,500. Under the terms of the will the testator left two legacies: one in the sum of $20,000 to his brother, Franklin H. Roberts, and a like legacy to his sister, Helen Roberts Truax. The entire residue of the estate was left to the surviving widow, respondent herein.

On May 27, 1955, Loretto Lohman Roberts, surviving widow, pursuant to the provisions of sections 22-107, and 22-108, R.C.M. 1947, filed her renunciation of the will. No question is raised as to her right to renounce, nor as to the sufficiency of the renunciation filed as to form.

On June 14, 1955, Loretto Lohman Roberts filed her petition for determination of heirship, resulting after due presentation to the court below, in the court's decree dated December 14, 1955, and filed December 17, 1955, that she was entitled under the law to the whole of the estate. This appeal is from the judgment and decree.

The sole question presented is, may a surviving widow by renouncing the benefits of a will thereby create an intestacy? The question has never been

squarely before this court prior to this appeal.

The right to dispose of property by will is a valuable right and will be protected by the courts, absent certain well-defined exceptions as to capacity, none of which is presented here and subject to certain restrictions as to amount. Ordinarily a renunciation is used by a surviving widow when her protected dower interest in real property exceeds in value the provisions made for her under the will.

The "renunciation" statute applicable herein, section 22-107, R.C.M. 1947, and prior to amendment, read as follows: "Every devise or bequest shall bar a widow's dower in lands or her share in personal estate unless otherwise expressed in the will; but she may elect whether she will take such devise or bequest, or whether she will renounce the benefit of such devise or bequest, and take her dower in the lands and her share in the personal estate." This section was amended by the enactment of chapter 231, Laws of 1955, effective July 1, 1955, to read as follows: "Every devise or bequest to her by her husband's will shall bar a widow's dower in his lands and her share in his personal estate unless otherwise expressed in the will; but she may elect whether she will take under the provisions for her in the will of her deceased husband or will renounce the benefit of such provisions for her, and take her dower in the lands and her share in the personal estate under the succession statutes, as if there had been no will, but not in excess of two-thirds (2/3) of the husband's net

estate, real and personal, after the payment of creditors' claims, expenses of administration and any and all taxes, including state and federal inheritance and estate taxes." The 1955 amendment is not applicable here and it is to be considered only as it might aid in statutory construction.

It will be noted that under the provisions of section 22-107, R.C.M. 1947, supra, prior to the amendment and the law with which we are concerned, provided, in case of a widow's renunciation she would then "take her dower in the lands and her share in the personal property." Dower is defined by section 22-101, R.C.M. 1947, and is not applicable here, as no real property is involved in this appeal. ". . . her share in the personal estate" was not defined prior to the enactment of chapter 231, Laws of 1955, and we need not define it here for reasons that follow. As has been pointed out by the courts of other states, when a widow renounces, she takes only that amount of the estate she is entitled to under "the Code . . . as a matter of contract and of right and not by inheritance." Kuhn v. Kuhn, 125 Iowa 449, 451, 101 N.W. 151.

In Kilgore v. Kilgore, 319 Ill. 298, 149 N.E. 754, the court said: "When he died testate she acquired no vested right in his estate under the law of descent. . . . (renunciation) did not give or purport to give to her the same interest which she would have received in case he died intestate . . .

". . . This court has held in a long line of cases that

where the widow renounces the provision made for her by the will of her deceased husband and elects to take under the law, such renunciation does not have the effect to render any part of the estate of the deceased husband intestate estate."

In In re Estate of Noble, 194 Iowa 733, 739, 190 N.W. 511, that court stated:

"If the decedent had died intestate, there can be no question that, under Section 3379, the widow would have been entitled to the entire estate, above debts and expenses, to the amount of $7,500, and one-half of the excess; but, as we view it, that statute has no application to the situation in this case. The decedent did not die intestate. The widow renounced the will, and elected to take her distributive share, and has received from the entire estate of the testator her full share therein. This is all that she can obtain from the estate of a decedent who leaves a will. . . . The decedent having died testate, her share in his estate, in the event she renounced the will, is limited to one-third share therein. This share is to be enlarged only in the single instance where a decedent dies intestate. It has no application to a situation where he dies leaving a will."

As pointed out in the authorities cited, when the respondent herein renounced the provisions made for her under the will, she did not thereby automatically place herself in a position whereby she was entitled to inherit under the statutes of succession. This is true for the reasons pointed out above and also is

demonstrated by the wording of our statute of succession, the benefit of which provision is here sought by the respondent.

Our statute of succession (chapter 140, Laws of 1941, now R.C.M. 1947, § 91-403) pertinent here, provides: "When any person . . . **dies without disposing of the estate by will** it is succeeded to and must be distributed . . . in the following manner: . . .

"2. If the decedent leaves no issue, the whole of the estate shall go to the surviving husband or wife. . . ." Emphasis supplied.

It is to be noted that in the instant appeal, the deceased did not die without disposing of his estate by will, but on the contrary, left very specific instructions with regard to the disposition of his estate, and nothing is contained in any statute which makes it impossible to follow his expressed wishes. Furthermore, in this connection, attention is particularly invited to the wording of the 1955 amendment, to section 22-107, supra, which now provides that in the event the widow elects, then she shall "take her dower in the lands and her share in the personal estate **under the succession statutes.**" Emphasis supplied. This clearly demonstrates that our Legislature has now clarified the situation with reference to the share that a renouncing widow may have and has put to rest the question of that amount following the renunciation of the benefits of a will.

To answer the question posed, supra, a widow's election to renounce under a will does not create an

intestacy but only serves to modify the provisions of the will insofar as necessary to give to the widow that property which is hers "as a matter of contract and of right and not by inheritance." Kuhn v. Kuhn, 125 Iowa 449, supra.

In Suiter v. Suiter, 323 Ill. 519, 522, 154 N.E. 337, we find: "Unless it clearly appears to the contrary it will be presumed that the testator intended to dispose of all his property by his will and to leave no part of it as intestate property, and the court will adopt any reasonable construction of the will that will avoid a conclusion of intestacy as to a part of the property. (Citing cases.) The fact that a widow renounces the provision made for her in her husband's will does not destroy the will or render any part of the estate intestate." To the same effect see Johnson v. Stringer, 158 Md. 315, 148 Atl. 447, 451; 4 Page, Wills, pp. 12, 74; Second Nat. Bank v. Second Nat. Bank, 171 Md. 547, 190 Atl. 215, 111 A.L.R. 711; Cochran v. Garth, 163 Tenn. 59, 40 S.W.2d 1023, 76 A.L.R. 1413; 19 Tenn. Law Rev. 941; 2 Cinn. Law Rev. 310, 322.

In this state section 91-312, R.C.M. 1947, provides: "Legacies are due and deliverable at the expiration of one year after the testator's decease."

Interest upon legacies is provided for by section 91-313, R.C.M. 1947, reading in part: "Legacies bear interest from the time when they are due and payable . . ."

The judgment and decree of the district court is

reversed with instructions to enter judgment and decree determining that Franklin H. Roberts is entitled to his legacy in the sum of $20,000 and that Helen Roberts Truax is entitled to her legacy in the sum of $20,000, and after payment thereof the residue of the estate be distributed to the surviving widow; said judgment and decree to provide for interest at the statutory rate to the two legatees from November 9, 1955, to date of payment. Appellants to recover their costs on appeal.

VICTOR H. FALL
District Judge

We concur:

JAMES T. HARRISON
Chief Justice

WESLEY CASTLES
ALBERT H. ANGSTMAN
HUGH ADAIR
Associate Justices

APPENDIX C

Hon. Victor H. Fall, District Judge sitting in place of Mr. Justice Bottomly, delivered the Opinion of the Court on Motion for Rehearing.

The facts involved in this appeal are:

George W. Roberts died testate on November 9, 1954. He left surviving his widow, Loretto Lohman Roberts. There were no children. The will was offered for and admitted to probate. No question whatever has been raised relative to the validity of the will. Letters testamentary were granted to the surviving widow, respondent herein, and her coexecutor on December 4, 1954. The inventory and appraisement filed April 19, 1955, disclosed that the estate consisted wholly of personal property—cash in the sum of $49,296.60; stocks, bonds, notes and mortgages, which together with other personal property amounted to a total value in excess of $306,000. On June 18, 1955, a supplemental inventory and appraisement listed, "for tax purposes only," real property situate in Cascade County, Montana, of the value of $25,000. Total creditors' claims filed amounted to less than $1,500. Under the terms of the will the testator left two legacies: one in the sum of $20,000 to his brother, Franklin H. Roberts; and a like legacy to his sister, Helen Roberts Truax. The entire residue of the estate was left to the surviving widow, respondent herein.

On May 27, 1955, Loretto Lohman Roberts, surviving widow, pursuant to the provisions of sections 22-107 and 22-108, R.C.M. 1947, filed her renunciation of the will. No question is raised as to her right to renounce, nor as to the sufficiency of the renunciation filed as to form.

On June 14, 1955, Loretto Lohman Roberts filed her petition for determination of heirship, resulting after due presentation to the court below, in the

court's decree dated December 14, 1955, and filed December 17, 1955, that she was entitled under the law to the whole of the estate. This appeal is from the judgment and decree.

The sole question presented is, may a surviving widow by renouncing the benefits of a will thereby create an intestacy? The question has never been squarely before this court prior to this appeal.

The right to dispose of property by will is a valuable right and will be protected by the courts, absent certain well-defined exceptions as to capacity, none of which are presented here and subject to certain restrictions as to amount. Ordinarily a renunciation is used by a surviving widow when her profected dower interest in real property exceeds in value the provisions made for her under the will.

The "renunciation" statute applicable herein, section 22-107, R.C.M. 1947, and prior to amendment, read as follows:

"Every devise or bequest shall bar a widow's dower in lands or her share in personal estate unless otherwise expressed in the will; but she may elect whether she will take such devise or bequest, or whether she will renounce the benefit of such devise or bequest, and take her dower in the lands and her share in the personal estate." This section was amended by the enactment of Chapter 231, Laws of 1955, effective July 1, 1955, to read as follows:

"Every devise or bequest to her by her husband's will shall bar a widow's dower in his lands and her share in his personal estate unless otherwise expressed in the will; but she may elect whether she will take under the provisions for her in the will of her deceased husband or will renounce the benefit of such provisions for her, and take her dower in the lands and her share in the personal estate under the succession statutes, as if there had been no will, but not in excess of two-thirds (2/3) of the hus-

band's net estate, real and personal, after the payment of creditors' claims, expenses of administration and any and all taxes, including state and federal inheritance and estate taxes." The 1955 amendment is not applicable here and it is to be considered only as it might aid in statutory construction.

It will be noted that under the provisions of section 22-107, R.C.M. 1947, supra, prior to the amendment and the law with which we are concerned, provided, in case of a widow's renunciation she would then "take her dower in the lands and her share in the personal property." Dower is defined by section 22-101, R.C.M. 1947, and is not applicable here, as no real property is involved in this appeal. ". . . her share in the personal estate" was not defined prior to the enactment of Chapter 231, Laws of 1955, and we need not define it here for reasons that follow.

Our statutes relating to dower were evidently adopted from the State of Illinois. While most of our statutes were adopted from California, this is not true of those relating to dower. California has no statutes comparable to ours which are now found in sections 22-101 and 22-117, R.C.M. 1947. Our statutes on the subject were adopted in 1876, and are found in the Laws of Montana, Ninth Session, commencing on page 63. Section 1 thereof was an exact copy of section 1 of the statutes of Illinois on dower found in Scates, Treat and Blackwell Statutes of 1858 (Ill. Rev. Stat. 1845, Chap. XXXIV). It now appears with an amendment added to the codes by Section 228, Civil Codes of 1895 as section 22-101.

Section 22-102 is an exact copy of section 3 of the Illinois statute.

Section 22-103 is an exact copy of section 4 of the Illinois statutes.

Section 22-104 is an exact copy of section 5 of the Illinois statutes.

Section 22-105 is an exact copy of section 6 of the Illinois statutes.

Section 22-107 before its amendment in 1955 was an exact copy of section 10 of the Illinois statute except that the Illinois statute had on the end the words "of her husband," but the omission of those three words from our statute did not change its meaning.

Section 22-108 is identical with section 11 of the Illinois statute.

Section 22-109 is identical with section 15.

Section 22-110 is identical with section 16.

Section 10 of the Act of 1876 was identical with section 17 of the Illinois statute, but has since been dropped from our statute, and section 11 of the Act of 1876 was identical with section 18 of the Illinois statute, but it too has been dropped from our statute.

It is quite apparent that our statutes on dower, with some slight modifications not material here, were adopted from Illinois. Prior to their adoption the Supreme Court of Illinois under facts identical with those here held that the widow, upon her election to renounce the will, was not entitled to all of the personal property of the testator under statutory provisions giving her that right when her husband died intestate.

The Illinois court in speaking on that point in McMurphy v. Boyles, 49 Ill. 110, 113, which was decided in 1868, said:

"On the other hand, it is urged by counsel for appellant as already stated, that the widow, having renounced the will, is entitled to the same share of the personal estate that she would have received had there been no will, which in this case, as there were no children, would be the whole. This theory proceeds upon the assumption that, by the widow's

renunciation of the will, the testator had become intestate, which is simply a contradiction in terms. The will remains, notwithstanding she has chosen to decline its provisions in her favor, and by no act of hers can it be annihilated, and the estate of her husband be converted into an intestate estate. Yet the 46th section of the statute of wills, under which this claim to all the personal property is made, applies only to intestate estates. This case, then, is not within its category."

This construction has been consistently followed by the Illinois court. In Kilgore v. Kilgore, 319 Ill. 298, 145 N.E. 754, the court said: "When he died testate she acquired no vested right in his estate under the law of descent . . . (renunciation) did not give or purport to give her the same interest which she would have received in case he died intestate . . .

" . . . This court has held in a long line of cases that where the widow renounces the provision made for her by the will of her deceased husband and elects to take under the law, such renunciation does not have the effect to render any part of the estate of the deceased husband intestate estate." McMurphy v. Boyles, 49 Ill. 110; Marvin v. Ledwith, 111 Ill. 144; ReQua v. Graham, 187 Ill. 67, 58 N.E. 357, 52 L.R.A. 641; Laurence v. Balch, 195 Ill. 626, 63 N.E. 506; Lewis v. Sedgwick, 223 Ill. 213, 79 N.E. 14; Dunshee v. Dunshee, 251 Ill. 405, 96 N.E. 298, and id. 263 Ill. 188, 104 N.E. 1100; Wakefield v. Wakefield, 256 Ill. 296, 100 N.E. 275, Ann. Cas. 1913E, 414; Davis v. Mather, 309 Ill. 284, 141 N.E. 209.

Under repeated decisions of this court, a borrowed statute will receive the same construction by this court which it had previously received by the courts of the state from which it was adopted. Many of the cases so holding are cited in Esterly v. Broadway Garage, 87 Mont. 64, 285 P. 172.

One other point should be noted.

In the annotations appearing under each section of the codes from section 22-101 to 22-110, inclusive, it is stated that the section was first enacted in 1866 which was before the decision in the McMurphy case. However, an examination of chapter XXXVI of the Laws of 1866 will disclose that all of its provisions are quite different from the Illinois statutes then in effect and of course quite different from sections 22-101 to 22-110 as they were adopted in 1876 after Congress by the Act of March 2, 1867 (Vol. 14 U.S. Statutes at Large, p. 426), had declared the Act of 1866 a nullity.

The first time that Montana had statutes comparable to what are new sections 22-101 to 22-110 was in 1876 when they were adopted from Illinois. Aside from the point of adopting the construction placed upon the statute by Illinois this court in Dahlman v. Dahlman, 28 Mont. 373, 377, 72 P. 748, indicated that it would reach the same conclusion when a widow elects to renounce the will. The court said: "This estate falls to her, not as heir, or by will of her husband, but by virtue of her marital right, and without regard to the law relating to the rights of heirs, or to any will made by the husband."

The same construction has been given by other courts under similar facts as for example, Kuhn v. Kuhn, 125 Iowa 449, 451, 101 N.W. 151. That court said: That when a widow renounces she takes only that amount of the estate she is entitled to under "the Code . . . as a matter of contract and of right, and not by inheritance."

In In re Estate of Noble, 194 Iowa 733, 739, 190 N.W. 511, 26 A.L.R. 86, that court stated:

"If the decedent had died intestate, there can be no question that, under Section 3379, the widow would have been entitled to the entire estate, above

debts and expenses, to the amount of $7,500, and one-half of the excess; but, as we view it, that statute has no application to the situation in this case. The decedent did not die intestate. The widow renounced the will, and elected to take her distributive share, and has received from the entire estate of the testator her full share therein. This is all that she can obtain from the estate of a decedent who leaves a will . . . The decedent having died testate, her share in his estate, in the event she renounced the will, is limited to one-third share therein. This share is to be enlarged only in the single instance where a decedent dies **intestate.** It has no application to a situation where he dies leaving a will."

And see Suiter v. Suiter, 323 Ill. 519, 522, 154 N.E. 337; Johnson v. Stringer, 158 Md. 315, 148 A. 447; Second Nat'l Bank v. Second Nat'l Bank, 171 Md. 547, 190 A. 215, 111 A.L.R. 711; Cochran v. Barth, 163 Tenn. 59, 40 S.W.2d 1023, 76 A.L.R. 1413; 4 Page, Wills, pp. 12, 74; 19 Tenn. Law Review 941; 2 Cinn. Law Review 310.

As pointed out in the authorities cited, when the respondent herein renounced the provisions made for her under the will, she did not thereby automatically place herself in a position whereby she was entitled to inherit under the statutes of succession. This is true for the reasons pointed out above and also is demonstrated by the wording of our statute of succession, the benefit of which provision is here sought by the respondent.

As above noted we need not here determine what interest in the personal estate the widow is entitled to upon renouncing the will. Certainly she is not entitled to the whole thereof. It is noteworthy that the Illinois courts have limited her to a one-third interest therein. McMurphy v. Boyles, supra; White v. Dance, 53 Ill. 413; In re Taylor's Will, 55 Ill. 252. These decisions so holding were rendered

before we adopted the statute and from what has been said we will presume that the legislature intended to adopt such construction.

Our statute of succession (Ch. 140, Laws of 1941, now R.C.M. 1947, § 91-403) pertinent here, provides: "When any person . . . **dies without disposing of the estate by will,** it is succeeded to and must be distributed . . . in the following manner: . . .

"2. If the decedent leaves no issue, the whole of the estate shall go to the surviving husband or wife . . ." Emphasis supplied.

It is to be noted that in the instant appeal, the deceased did not die without disposing of his estate by will, but on the contrary, left very specific instructions with regard to the disposition of his estate, and nothing is contained in any statute which makes it impossible to follow his expressed wishes. Furthermore, in this connection, attention is particularly invited to the wording of the 1955 amendment, to section 22-107, supra, which now provides that in the event the widow elects, then she shall "take her dower in the lands and her share in the personal estate **under the succession statutes.**" Emphasis supplied. This clearly demonstrates that our Legislature has now clarified the situation with reference to the share that a renouncing widow may have and has put to rest the question of that amount following the renunciation of the benefits of a will.

In this state, section 91-312, R.C.M. 1947, provides:

"Legacies are due and deliverable at the expiration of one year after the testator's decease . . ."

Interest upon legacies is provided for by section 91-313, R.C.M. 1947, reading in part: "Legacies bear interest from the time when they are due and payable . . ."

The judgment and decree of the district court is

reversed with instructions to enter judgment and decree determining that Franklin H. Roberts is entitled to his legacy in the sum of $20,000 and that Helen Roberts Truax is entitled to her legacy in the sum of $20,000, and after payment thereof the residue of the estate be distributed to the surviving widow; said judgment and decree to provide for interest at the statutory rate to the two legatees from November 9, 1955, to date of payment. Appellants to recover their costs on appeal.

On motion for rehearing the opinion promulgated herein on March 21, 1958, is hereby withdrawn and this opinion reaching the same conclusion is substituted in lieu thereof.

The motion for rehearing is denied.

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 9661

IN THE MATTER OF THE ESTATE OF GEORGE W. ROBERTS, Deceased.

LORETTO LOHMAN ROBERTS,

Respondent,

vs.

FRANKLIN H. ROBERTS and HELEN ROBERTS TRUAX,

Appellants.

ORDER

The motion of respondent for recall of remittitur and for leave to file petition for rehearing is denied.

DONE this 20th day of July 1959.

JAMES T. HARRISON
Chief Justice

WESLEY CASTLES
ALBERT H. ANGSTMAN
Associate Justices

VICTOR H. FALL
District Judge Victor H. Fall sitting in place of Mr. Justice Bottomly.